SUPREME COURT

In the

Supreme Court of the United States

October Term, 1979

No. 79-1705

CALVIN JOSEPH LAWSON, JR.,

Petitioner,

v.

D. P. EDWARDS, JR., Superintendent, Bureau of Correctional Field Units and A. L. SLAYTON, JR., Superintendent, Virginia State Penitentiary,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI

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In The

Supreme Court of the United States

October Term, 1973

No. 73-1799

CALVIN JOSEPH LAWSON, JR.,
Petitioner,

v.

D. P. EDWARDS, JR., Superintendent, Bureau of Correctional Field Units and A. E. SLAYTON, JR., Superintendent, Virginia State Penitentiary,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR RESPONDENTS IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The respondents, D. P. Edwards, Superintendent of the Bureau of Correctional Field Units and Addison E. Slayton, Jr., Superintendent of the Virginia State Penitentiary, respectfully pray that a Writ of Certiorari to the judgment of the Supreme Court of Virginia entered in this case on March 4, 1974, not be granted.

OPINION BELOW

The opinion of the Supreme Court of Virginia was a denial of a writ of error which is not reported, but the order of the Court is set forth in the Appendix to the Petition for a Writ of Certiorari at page 1a. That judgment affirms the prior judgment of the Circuit Court for Rockingham County, Virginia, entered on August 7, 1972, a copy of which is set forth in the Appendix to the Petition for a Writ of Certiorari at pages 2a-3a. The Opinion and Order of the Circuit Court of Rockingham County is partially based on rulings made by the Judge of that Court from the bench and those portions of the transcript of the habeas corpus plenary hearing are attached hereto as an appendix to this brief.

JURISDICTION

Petitioner asserts that the jurisdiction of the Court to issue the Writ of Certiorari is grounded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether it was error to rule that Petitioner, a male, had no standing to raise the issue of systematic exclusion of women from his trial jury, particularly when he was charged with rape and raised the defense of consent, in violation of the Constitution of Virginia and the Sixth and Fourteenth Amendments to the Constitution of the United States?

2. Whether the failure to record an incident of trial and the failure to instruct the trial jury as to the punishment for one of the charged offenses constitutes highly prejudicial error and a de[illegible] Due Process and Equal Protection

under the Fourteenth Amendment to the Constitution of the United States thus entitling Petitioner to a new trial?

STATEMENT OF THE CASE

On July 24, 1974, petitioner Calvin Joseph Lawson, Jr., a male, was tried by a jury in Rockingham County, Virginia upon indictments charging him with rape and abduction with intent to defile. The jury that tried petitioner was selected from a master jury list prepared by jury commissioners containing 307 names, with only 23 of that number being women. A venire of 22 was summonsed from the master jury list for petitioner's trial and of the ultimate panel of 12 chosen none were women. No objection whatsoever was made to the jury selection process or the composition of the jury at the time of petitioner's trial or appeal to the Supreme Court of Virginia and no such issue was raised until the Petition for a Writ of Habeas Corpus filed after judgment and appeal.

The proceedings in the trial court on July 24, 1974, were recorded, but apparently for reasons of economy, the tape did not begin recording until after the indictments had been read, the plea entered and the jury selected. However, it was the practice of the Court to read a charge to the jury at the time of arraignment which set forth the permissible limits of punishment for the offenses charged and this so-called "charge to the jury" was written out and was a part of the record in this case. At the subsequent habeas corpus plenary hearing none of the participants specifically recalled the charge being read but there was testimony that there was no deviation from the universal practice of reading the charge to the jury at this point during the trial proceedings.

At the conclusion of the trial, the jury was instructed

by the Court regarding the range of punishment for abduction with intent to defile but not as to the range of punishment for rape. The petitioner, Calvin Joseph Lawson, Jr., was convicted on both of the indictments and sentenced to serve six years in the Virginia State Penitentiary on the conviction of abduction with the intent to defile and an additional ten years in the Virginia State Penitentiary for rape, a sentence that was well within the range of punishment for rape in Virginia. No objection was raised at trial regarding the alleged absence of any instruction to the jury on the range of punishment for rape and such issue was not made a point in the Petition for Appeal to the Supreme Court of Virginia. This issue was initially raised, as was the jury discrimination issue, in the Petition for a Writ of Habeas Corpus filed after a writ of error had been refused by the Supreme Court of Virginia.

Lawson appealed to the Supreme Court of Virginia from his convictions in the Circuit Court of Rockingham County but writs of error were denied by that Court on June 15, 1971. In January of 1972 a Petition for a Writ of Habeas Corpus was filed in the Circuit Court of Rockingham County and by order of March 27, 1972, the respondents were ordered to reply. An Answer was thereafter filed in April of 1972, and after further pleadings were filed, a plenary hearing was held in the Circuit Court of Rockingham County on July 10, 1972, and, after that hearing, by Order of August 7, 1972, the Petition for a Writ of Habeas Corpus was denied and dismissed and on March 4, 1974, the Supreme Court of Virginia refused a writ of error and affirmed the judgment of the Circuit Court of Rockingham County on the authority of *Quick* v. *Harris*, 214 Va. 632, 202 S.E.2d 869 (1974).

ARGUMENT

I

The Supreme Court Of Virginia Properly Ruled That The Petitioner Had No Standing Whatsoever To Raise The Issue Of Sex Discrimination In The Selection Of His Jury In 1970.

Prior to the decision of this Honorable Court in *Peters* v. *Kiff*, 407 U.S. 493 (1972), Your Honors have always taken the position that an individual has no standing to challenge jury discrimination against a class of which he was not a member. The *Peters* case contained three opinions with Justice Marshall announcing the judgment of the Court in an opinion joined by Justices Douglas and Stewart in which he expressed a view that a state defendant had standing to challenge a jury selection system on the ground that it had arbitrarily excluded members of any race on due process grounds. Mr. Justice White wrote a concurring opinion joined by Justices Brennan and Powell in which he asserted the position that the strong statutory policy of 18 U.S.C. § 243, providing that no citizen shall be disqualified from serving on a federal or State grand or petit jury on account of race, should be implemented by permitting a white person to challenge a state court conviction on the ground that blacks were arbitrarily excluded from the Grand Jury that indicted him. Chief Justice Burger wrote a dissenting opinion joined by Justices Blackmun and Rehnquist, and that opinion was premised on the rationale that a defendant must demonstrate specific prejudice to him from the exclusion of a class from grand or petit jury service.

Passages of the two majority opinions are instructive on the question of standing. Justice Marshall's opinion recognized that:

> "This Court has never before considered a white defendant's challenge to the exclusion of Negroes from jury service." (407 U.S. at 497).

This statement was footnoted, and in that footnote Justice Marshall stated:

> "A number of state courts and lower federal courts have imposed a 'same-class' rule on challenges to discriminatory jury selection, holding that the exclusion of a class from jury service is subject to challenge only by a member of the excluded class. Only a few courts have rejected the rule. . . ." (407 U.S. at 497, fn. 4).

Justice White in his concurring opinion refers to the Court's prior decision in *Hill* v. *Texas,* 316 U.S. 400 (1942), and goes on to state:

> "It is true that the defendant in *Hill* was a Negro and petitioner here is a white man. It is also true that there is no case in this Court setting aside a conviction for arbitrary exclusion of a class of citizens from jury service where the defendant was not a member of the excluded class. I also recognize that, as in this case, the Courts of Appeal, reflecting the generally accepted constitutional view, have rejected claims such as petitioner presents here." (407 U.S. at 507).

Two-and-a-half months prior to the decision in the *Peters* case, the Court dealt with a jury discrimination issue in *Alexandria* v. *Louisiana,* 405 U.S. 625 (1972), a case in which a black defendant, prior to his trial, had moved to quash the indictment because blacks were included on the grand jury list in only token numbers and females were systematically excluded from the grand juries. The Court dealt with the racial discrimination argument but touched rather summarily on the sex discrimination issue and refused to reach it despite the strong urging of Justice Douglas. In his opinion for the Court, Justice White stated:

> "Petitioner also challenges the Louisiana statutory exemption of women who do not volunteer for grand jury service. Article 402, La. Code Crim. Proc. This claim is novel in this Court and, when urged by a male, finds no support in our past cases. The strong constitutional and statutory policy against racial discrimination has permitted Negro defendants in criminal cases to challenge the systematic exclusion of Negroes from the grand juries that indicted them. Also, those groups arbitrarily excluded from grand or petit jury service are themselves afforded an appropriate remedy. Cf. *Carter* v. *Jury Commission, supra.* But there is nothing in past adjudications suggesting that petitioner himself has been denied equal protection by the alleged exclusion of women from grand jury service." (405 U.S. at 633).

Finally, in *Fay* v. *New York,* 332 U.S. 261 (1947), Mr. Justice Jackson, writing for the Court, pointed out that:

> "This Court, however, has never entertained a defendant's objections to exclusions from the jury except when he was a member of the excluded class. [Citing cases] Relief has been held unavailable to a Negro who objected that all white persons were purposely excluded from the grand jury that indicted him. *Haraway* v. *State,* 203 Ark. 912, 159 S.W.2d 733. Nevertheless, we need not here decide whether lack of identity with an excluded group would alone defeat an otherwise well-established case under the Amendment." (332 U.S. at 287; see also *Salisbury* v. *Grimes,* 406 F.2d 50 (5th Cir. 1969); *Mosley* v. *Smyth,* 404 F.2d 346 (5th Cir. 1968); *Woodruff* v. *Breazeale,* 291 F.Supp. 130 (N.D. Miss. 1967); *aff'd.* 401 F.2d 997 (5th Cir. 1968); *Butler* v. *State,* 285 Ala. 387, 232 So.2d 631 (1970); *Blanton* v. *State,* 249 Ark. 181, 458 S.W.2d 373 (1970), *cert. den.* 401 U.S. 1003 (1971); *State* v. *Lea,* 228 La. 724, 84 So.2d 169 (1955), *cert. den.* 350 U.S. 1007 (1965)).

Thus, until the decision in *Peters,* the question of standing was almost unanimously resolved against a person attempting to challenge alleged discrimination in jury selection where he or she was not a member of the class allegedly excluded.

The petitioner herein relies quite heavily upon the decisions of the Court in *Thiel* v. *Southern Pacific Co.,* 328 U.S. 217 (1946) and *Ballard* v. *United States,* 329 U.S. 195 (1946). However, petitioner's reliance on those decisions is quite misplaced insofar as his attempt to apply them to a state prosecution is concerned. This Court itself pointed out in *Thiel* that their holding was based on "the exercise of our power of supervision over the administration of justice in the federal courts." (328 U.S. at 225). Similarly, in the *Ballard* case, the Court stated:

> "We conclude that the purposeful and systematic exclusion of women from the panel in this case was a departure from the scheme of jury selection which Congress adopted and that, as in the *Thiel* case, we should exercise our power of supervision over the administration of justice in the federal courts . . . to correct an error which permeated this proceeding." (329 U.S. at 193).

Mr. Justice Jackson clearly pointed to the inapplicability of *Thiel* and *Ballard* to State prosecutions in *Fay* v. *New York, supra:*

> "These defendants rely heavily on arguments drawn from our decisions in *Glasser* v. *United States,* 315 U.S. 60; *Thiel* v. *Southern Pacific Company,* 328 U.S. 217; and *Ballard* v. *United States,* 329 U.S. 187. The facts in the present case are distinguishable in vital and obvious particulars from those in any of these cases. But those decisions were not constrained by any duty of deference to the authority of the State over

> local administration of justice. They dealt only with juries in federal courts. Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts, and these expressions of policy are not necessarily embodied in the concept of due process." (332 U.S. at 287).

However, the most essential question is whether the "standing" rationale of *Peters* is applicable to any jury discrimination cases other than those involving race. As previously pointed out, only three of the nine justices predicated the defendant's standing on due process. In order to make up a majority of the Court, it was necessary to rely on Justice White's concurring opinion which was joined by Justices Brennan and Powell. Justice White refused to rest the standing in the *Peters* case on any generalized concept of due process but instead rested the concurring opinion on the provisions of 18 U.S.C. § 243 which provides as follows:

> "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; . . ."

Justice White further stated that he would:

> ". . . implement the strong statutory policy of § 243, which reflects the central concern of the Fourteenth Amendment with racial discrimination, by permitting petitioner to challenge his conviction on the ground that Negroes were arbitrarily excluded from the grand jury that indicted him." (407 U.S. at 507).

Justice White further stated that 18 U.S.C. § 243 clearly evinced an intention on the part of Congress to put:

> ". . . cases involving exclusions from jury service on grounds of race 'in a class by themselves . . . for us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race or color which is wanting in every other case of alleged discrimination,' *Fay* v. *New York*, 332 U.S. 261, 282-283 (1947)." (407 U.S. at 505-506).

Thus, it would appear that the holding in *Peters*, insofar as a majority of the Court is concerned, is limited to giving standing to a criminal defendant to object to the exclusion of members of a class to which he does not belong from jury service only where that exclusion is based on "race, color, or previous condition of servitude." *Peters* would thus give no solace to this petitioner insofar as his claim of sex discrimination is concerned.

II.

Even Assuming, Arguendo, That The Holding In Peters v. Kiff, Supra, Would Give This Petitioner Standing To Attack Alleged Sex Discrimination, That Decision Should Not Be Given Retroactive Effect Prior To June 22, 1972, And It Would Therefore Have No Effect So Far As This Petitioner Is Concerned.

Since the decision of this Honorable Court in *Peters* v. *Kiff*, *supra*, there have been few cases dealing with the question of the retroactive application of that decision to cases tried prior to the announcement of the decision in that case. At least two courts have considered the question of the retroactivity of *Peters* and have determined that it should only apply to cases arising after the *Peters* decision (*People* v. *Sirhan*, 7 Cal. 3rd 710, 497 P.2d 1121 (1972); *Watson* v. *United States*, 350 F.Supp. 57 (N.D. Ga. 1972, aff'd. 484 F.2d 34 (5th Cir. 1973))). In addition, during the course of Mr. Justice White's concurring opinion in

Peters, he asserted, as previously discussed, that the petitioner should be able to implement the statutory policy of 18 U.S.C. § 243 by challenging his conviction on the grounds that Negroes were arbitrarily excluded from the grand jury that indicted him. Mr. Justice White then goes on to conclude his concurring opinion with the following sentences:

> "This is the better view, and it is time that we now recognized it *in this case and as the standard governing criminal proceedings instituted hereafter.* Hence, I joined the judgment of the court." (407 U.S. at 507; emphasis supplied).

Mr. Justice Marshall, in his opinion announcing the judgment of the Court does not disagree with Mr. Justice White's announcement of a policy decision which would clearly appear to preclude retroactivity. It is, therefore, respectfully submitted that the plain language of the *Peters* case controls the determination of the retroactivity question and this petitioner could not receive the benefits of the *Peters* decision even if it were applicable to the standing question on a charge of sex discrimination.

III.

Even Assuming, Arguendo, That Peters v. Kiff, Supra, Applies Retroactively To The Petitioner And That It Also Gives Him Standing To Attack Alleged Discrimination Against Women In The Jury Selection Process, The Petitioner Has Waived His Objection To The Alleged Systematic Exclusion Of Women From The Grand Jury That Indicted Him And The Petit Jury That Convicted Him By Not Asserting His Objections Prior To The Filing Of A Petition For A Writ Of Habeas Corpus.

The Virginia Supreme Court has consistently ruled that an attack on the composition of a grand jury or petit jury

must be made at the appropriate time during the criminal proceedings against a defendant and cannot be initially raised on appeal (*Bailey* v. *Commonwealth*, 193 Va. 814, 71 S.E.2d 368 (1952), cert. den. 344 U.S. 886 (1952)). The waiver concept embodied in *Bailey* has been expressly approved by Your Honors in the recent decisions in *Davis* v. *United States*, 411 U.S. 233 (1973) and *Tollett* v. *Henderson*, 411 U.S. 258 (1973). The *Davis* case was a federal proceeding under 28 U.S.C. § 2255 where the petitioner was initially raising his objection to the grand jury selection process in a post-conviction collateral proceeding, a method in contravention of Rule 12(b)(2) of the Federal Rules of Criminal Procedure which provide in pertinent part that "defenses and objections based on defects in the institution of the prosecution or in the indictment . . . may be raised only by motion before trial," and that failure to present such a defense or objection "constitutes a waiver thereof, but the Court for cause shown may grant relief from the waiver." Your Honors held in *Davis* that the failure to comply with Rule 12(b)(2) precluded an initial collateral attack on the jury selection process. Virginia has had statutory counterparts to Rule 12(b)(2) which are set forth in § 19.1-158 of the Code of Virginia (1950), as amended, which applies to grand juries and § 19.1-201 which applies to petit juries. Section 19.1-158 provides:

> *"No irregularity in any writ of venire facias, in the drawing, summoning, returning or impanelling of jurors,* in making out or copying or signing or failing to sign the list or in drawing more persons than four in excess of the number to be summoned *shall be cause for summoning a new panel or for setting aside a verdict or granting a new trial, unless objection thereto specifically pointed out was made before the jury was sworn, and unless it appears that such irregularity, error or failure was intentional or such as probably to*

> *cause injustice to the Commonwealth or to the accused;* and no judgment shall be arrested or reversed for the failure of the record to show that there was a venire facias, unless made a ground of exception in the trial court before the swearing of the jury." (Emphasis supplied.)

These statutory provisions are every bit as specific, if not indeed more so, than Federal Rule of Criminal Procedure 12(b)(2), and it is respectfully submitted that the holding in the *Bailey* case, as amplified by this Honorable Court's decisions in *Davis* and *Tollett,* precludes petitioner's attack on the jury selection process during the post-conviction stage of the proceedings (see *Rivera* v. *Wainwright,* 488 F.2d 275 (4th Cir. 1974); *Marlin* v. *Florida,* 489 F.2d 702 (5th Cir. 1974); *United States ex rel. Allum* v. *Twomey,* 484 F.2d 740 (7th Cir. 1973)).

IV.

Even Assuming, Arguendo, That Petitioner Can Successfully Cross The Three Hurdles Discussed Above, It Is Respectfully Submitted That There Is No Constitutional Prohibition Against The Exclusion Of Women From Juries And The Petitioner's Argument On The Merits Would Be Moot.

In 1879 this Court decided the case of *Strauder* v. *West Virginia,* 100 U.S. 303 (1879), which was one of the earliest cases decided by this high court regarding the question of jury discrimination. During the course of that decision, Mr. Justice Strong made the following statement:

> "We do not say that, within the limits from which it is not excluded by the Amendment, a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. *It may confine the selection to males,* to freeholders, to citizens, to persons within certain ages, or to persons having educational

> qualifications. We do not believe the 14th Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color." (100 U.S. at 310; emphasis supplied).

Obviously, since the *Strauder* case involved a question of racial discrimination, Justice Strong's language quoted was merely *dictum*. However, it is *dictum* that has survived the passage of almost one hundred years. In *Fay* v. *New York, supra,* Mr. Justice Jackson made the following statements:

> "The contention that women should be on the jury is not based on the Constitution, it is based on a changing view of the rights and responsibilities of women in our public life, which has progressed in all phases of life, including jury duty, but has achieved constitutional compulsion on the states only in the grant of the franchise by the Nineteenth Amendment. We may insist on their inclusion on federal juries where by state law they are eligible but women jury service has not so become a part of the textual or customary law of the land that one convicted of crime must be set free by this Court if his state has lagged behind what we personally may regard as the most desirable practice in recognizing the rights and obligations of womanhood." (332 U.S. at 290).

Fourteen years later, in *Hoyt* v. *Florida*, 368 U.S. 57 (1961), Your Honors unanimously affirmed a criminal conviction of a woman as against her contention that a Florida statute was unconstitutional which granted women an absolute exemption from jury duty, based solely on their sex, by providing that they were not to be put on the jury list unless they had voluntarily registered for jury service. Mr. Justice Harlan, for the Court, said:

> "We need not, however, accept appellant's invitation to canvass in this case the continuing validity of this

> Court's dictum in *Strauder* v. *West Virginia,* 100 U.S. 303, 310, to the effect that a State may constitutionally 'confine' jury duty 'to males.' This constitutional proposition has gone unquestioned for more than eighty years in the decisions of the Court, see *Fay* v. *New York, supra* (332 U.S. at 289, 290), and had been reflected, until 1957, in congressional policy respecting jury service in the federal courts themselves. Even were it to be assumed that this question is still open to debate, the present case tenders narrower issues." (368 U.S. at 60).

As may be seen from the capsule description of the Florida statute set forth above, the Florida legislation was far more restrictive than Virginia's insofar as exemption from jury service was concerned. In *Alexander* v. *Louisiana, supra,* the Court refused to consider the continued validity of the *dictum* in *Strauder,* despite Justice Douglas's urgings that this issue be joined (see 405 U.S. at 634-635). Thus, it is respectfully submitted that the petitioner's allegations, even if proven after crossing the three prior hurdles, would be of no avail. (See *Bradley* v. *Texas,* 470 F.2d 785 (5th Cir. 1972); *Mosley* v. *Smyth,* 404 F.2d 346 (5th Cir. 1968); *State* v. *Enloe,* ..... La. ....., 276 S.2d 283 (1973); *United States* v. *Olsen,* 473 F.2d 686, 687 (8th Cir. 1973); see also *White* v. *Georgia,* ..... U.S. ..... 14 Crim. L. Rptr. 4030 (October 15, 1973)).

V.

The Supreme Court Of Virginia Properly Refused A Writ Of Error Relative To Petitioner's Claim That He Was Denied Due Process By The Failure Of The Trial Court To Record Every Incident Of The Trial And For The Alleged Failure To Instruct The Jury As To The Range Of Punishment For A Charged Defense.

It is undisputed that not every incident of the trial was recorded in 1970, but there was considerable conflict over

whether the jury was properly charged as to the range of punishment for rape. After hearing the evidence at a plenary hearing, the Judge of the Circuit Court of Rockingham County found as a matter of fact that a charge was given to the jury which advised them of the proper range of punishment for rape and that conclusion of the trial court judge comes before this Court buttressed by the action of the Supreme Court of Virginia in denying and refusing a writ of error. In addition, the petitioner cannot demonstrate in anyway how he was prejudiced by the failure of the Court to record every possible incident of the trial, especially where the defense counsel at his original trial were able to properly perfect an appeal to the Supreme Court of Virginia and this issue was not raised until post-conviction proceedings.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert E. Shepherd, Jr., Assistant Attorney General of Virginia, counsel for the respondents in the captioned matter and a member of the bar of the Supreme Court of the United States, do hereby certify that on or before the 28th day of August, 1974, I mailed three copies of the foregoing Brief for the Respondent in Opposition to the Granting of a Petition for a Writ of Certiorari to John C. Lowe, Esquire and F. Guthrie Gordon, III, Esquire, Lowe and Gordon, Ltd., 1111 W. Main Street, Charlottesville, Virginia 22903 counsel of record for petitioner.

ROBERT E. SHEPHERD, JR.
Assistant Attorney General

APPENDIX

[48] * * *

Court: Gentlemen, I prefer to rule on this question. I think there is merit to your argument, Mr. Lowe, the ABA standards for criminal justice adopt that view, but in the light of the decision of the Hoyt case and as Mr. Shepherd pointed out, three justices in the case of Peters against Kipp grounded their decisions entirely on the statute . . . and specifically declined to base their decision on [49] due process as did Mr. Justice Marshall, Mr. Justice Douglas, and Mr. Justice Stewart. So if we accept that case, it does appear that we have three justices who would agree with you and six justices who would not unless they would change their views. That being the case and in the light of the Hoyt case I don't conceive it the responsibility of this Court to be one or two jumps ahead of the United States Supreme Court and therefore on that ground the Court will overrule your motion.

[84] * * *

Gentlemen, the evidence in this case shows at least as long as Mr. Kemper has been Clerk and Judge Haas was presiding, the universal practice of trial of felony cases in this Court was that when the jury was sworn the Clerk orders the defendant to stand and says: Look upon the accused and hearken to his cause. He has been indicted thus —[85] and then he reads the indictment. He then reads the charge to the jury and says, first he reads the indictment to the jury. After he reads the indictment he says: Upon this indictment he has pleaded not guilty and put himself upon the country, which country you are. He then reads the charge and tells them if you find him guilty, guilty of such and such, you will fix his punishment as such and such. If you find him not guilty you will say so and no more. And then says hearken to the evidence. Now the evidence from

the Clerk and the Commonwealth's Attorney is that that has been the universal practice in this Court. While it is true that they do not have specific recollection of what was done in this specific case the inference or presumption has to be that that which is usually done was done in this case. There is also the evidence, I presume for reasons of economy, that Judge Haas did not turn on the recorder until the mere formality such as swearing the jury, taking the attendance of the jury, the opening of Court, was not on the recording machine. As I said I assume for reasons of economy. Now there is nothing in the statute that makes the failure to record or to transcribe [86] incidents of the trial a deprivation of due process unless it is shown that he was prejudiced thereby. As I deal with the evidence, the petitioner has not shown that the charge was not read sufficiently. The record shows that the charge in each of the indictments was in the record of the case and the presumption has to be that since it is in the record, that it was placed in the record regularly. Therefore, the accused has not shown that he has suffered any prejudice as a result of the failure to properly instruct the jury on the measure of punishment. As a matter of fact the record seems to indicate that the jury was properly instructed on the measure of punishment. And therefore the petition will be denied and the petitioner will be remanded to custody.

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